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January 15, 1999

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JAN 15 1999

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: CC Docket 98-1  
Ex Parte Meeting

Dear Ms. Salas:

On January 14, 1999, Richard Keane, and Michael Nowick, Minnesota Telephone Association ("MTA"); Lawrence Sarjeant, United States Telephone Association, and the undersigned met with Kyle Dixon of the office of Commissioner Powell. The purpose of the meeting was to discuss the petition of the state of Minnesota for a declaratory ruling regarding the effect of Section 253 of the Communications Act on an Agreement adopted by the Minnesota Department of Transportation granting exclusive use of freeway right of way to a single communications provider.

The discussion reflected the filed position of the MTA that the Agreement violates Section 253(a) by creating a barrier to entry, and is not within the authority of the state as provided in either Sections 253(b) or (c). The discussion reviewed a written ex parte letter filed December 22, 1998 on behalf of MTA. The disadvantages of requiring all service providers to utilize the facilities of the Exclusive Provider were summarized as follows: there is no effective standard or recourse to control the price of capacity, the availability of capacity will be within the control of a competitor, the quality of service provider will be controlled by a competitor and the ordering of service will provide valuable business information.

In addition the supplemental affidavit of Kenneth D. Knuth was provided which demonstrates the substantial cost disadvantage of utilizing alternatives ROWs to the freeways. Also provided was paper discussing alternative approaches to ensuring highway safety and traffic flow which do not require an exclusive grant of right of way access to one entity. Copies of these documents are attached.

In response to a question regarding the impact on competitors if the state established an annual window during which entities other than the Exclusive Entity could install fiber, the MTA representatives indicated that an annual window would not be ideal, but would be adequate.

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However any longer construction interval would not be. It was noted that construction is usually halted in November of each year because of frozen ground and not resumed until at least April.

If there are any questions regarding this matter, please contact me at the number listed above.

Sincerely,

  
David Cosson

Attachment

cc: Kyle Dixon  
Parties to CC Docket 98-1

STATE OF MINNESOTA )  
 ) ss  
COUNTY OF MURRAY )

SUPPLEMENTAL AFFIDAVIT OF  
KENNETH D. KNUTH

1. This Supplemental Affidavit is submitted to supplement and clarify my Affidavit dated March 8, 1998 ("First Affidavit") regarding the costs of using rights-of-way ("ROW") of electric transmission lines, natural gas pipeline, liquid pipeline and railroads as alternatives to the Interstate freeway ROW in Minnesota and to provide more specific information as recommended in the Suggested Guidelines For Petitions For Ruling Under Section 253 of the Communications Act, FCC 98-295. For the reasons that are discussed in this Affidavit, use of ROWs of electric transmission lines, natural gas pipeline, liquid pipeline and railroads, even if available, would impose cost disadvantages that are even greater than the cost disadvantages of using the regular trunk highways.

2. As summarized in paragraph 12 of my First Affidavit, railroad rights-of-way do not provide a feasible alternative to the use of freeway rights-of-way because the cost of obtaining the right to install facilities is prohibitive. Our experience demonstrates that the fee imposed by the railroad companies for the right to install are typically \$8,000 per mile, and additional labor costs of several thousand dollars per mile for railroad personnel are typically incurred during installation. The attached Table 1 shows that the use of railroad rights-of-way would increase the overall cost by about 102% for the Minneapolis to Fargo/Moorhead segment, 106% for the Minneapolis to Duluth route, and 103% overall for these two segments. These calculations assume that a rail route is available and that the route miles are the same as the Interstate route miles. Maintenance of cables placed on railroad rights-of-way are generally more difficult because of limited access and by the limitation of track time. (Railroad ROWs are very dangerous, therefore the railroad company limits when work can be done on the ROW depending on train traffic. It is not unusual to lose between 10 to 30% of the work week due to lack of track time.) For these reasons, the use of railroad rights-of-way are not viable alternatives to the use of freeway rights-of-way.

3. As summarized in paragraph 13 of my First Affidavit, electric transmission rights-of-way do not provide a feasible alternative to the use of freeway rights-of-way because these easements are most often limited specifically to electric transmission. This fact requires that the process of negotiation and obtaining easements with individuals along the route be undertaken. This will add significantly to the cost and a route can be made unavailable as the result of a single landowner's refusal to bargain. A typical cost for right-of-way is \$1.00 per foot plus the cost of obtaining the easement. If the landowners are willing to allow use, the fees demanded along with the cost of obtaining the permission would be in the same range as using railroad rights-of-way. The data presented in the attached Table 1 therefore is applicable. Second, owners of electric transmission facilities are very reluctant to allow other use of these high voltage rights-of-way (unlike low voltage distribution facilities) because of potential damage to the critical high voltage transmission lines and facilities. Third, a review of the map submitted as Exhibit 12 to the State Petition shows that the routing of electric transmission lines is far less direct and that the transmission lines do not connect many

communities along the freeway routes. As a result, the costs of connecting these communities will be even greater. For all of these reasons, the use of electric transmission routes are not viable alternatives to the use of freeway rights-of-way.

4. As summarized in paragraph 13 of my First Affidavit, neither natural gas pipeline rights-of-way nor liquid product pipeline rights-of-way provide a feasible alternative to the use of freeway rights-of-way for several reasons. First, owners of natural gas transmission pipeline rights-of-way and liquid product pipeline rights-of-way (both unrefined and refined oil products) are very reluctant to allow other use of these rights-of-way because of very serious safety issues associated both with installation and any maintenance of any other facilities. Unintended contact with a natural gas pipeline can have immediate, catastrophic consequences, along with severe environmental implications. The same is true of pipelines that carry refined oil products (such as gasoline or kerosene) or propane. Unrefined petroleum is less volatile, but owners are still generally unwilling to allow such use. Environmental concerns are also a severe obstacle to owners of any such pipelines. Certainly, it would be extremely difficult to convince the owners of any such pipeline to allow installation of fiber facilities over a short route. Second, generally the pipeline easement is just for the pipeline, much as power lines, and new permission has to be obtained just as described in paragraph 3 above. With these considerations the cost of obtaining the right-of-way is very similar to the cost of purchasing railroad ROW and the attached Table 1 is applicable. Third, a review of Exhibits 13 and 15 of the State's Petition shows that routing is far less direct and does not even reach all communities along freeway rights-of-way. Pipelines are routed to avoid proximity to communities whenever possible, for safety and environmental reasons. As a result, use of such pipelines to obtain access to communities along the freeways would involve significant indirect routing and use of additional alternatives. Finally, a review of the map shows that there are virtually no east to west pipelines that resemble southern Minnesota freeway route. For all of these reasons, the use of pipeline rights-of-way are not viable alternatives to the use of freeway rights-of-way.

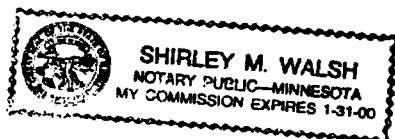
5. In conclusion, while the multiple facilities shown on Exhibits 12 through 15 of the State's Petition superficially suggest that there are many alternatives to the use of freeway rights-of-way, many are completely unavailable because of owners' unwillingness to risk contact with their facilities and would impose cost barriers that are even more severe than the cost barriers of using the regular trunk highways.

Signed *Kenneth D. Knuth*  
Kenneth D. Knuth, P.E.

Date Jan. 12, 1999

Subscribed and sworn to before me on January 12, 1999

*Shirley M. Walsh*  
NOTARY PUBLIC



**TABLE 1**

A	B	C	D	E	F	G	H	I
Route	Route Miles	Installation Cost	Per Mile Cost of Fiber, etc. \$	Route Fiber Cost B*D	Private Right-of-Way Cost B*10,000	Total Cost C+E+F	Dollar Cost Difference	% Increase to Use Private Right-of-Way
<b>Minneapolis/Fargo</b>								
Interstate	224	1,311,072	7,400	1,657,600	0	2,968,672		
Private ROW	224	2,088,751	7,400	1,657,600	2,240,000	5,986,351		
							3,017,679	101.65
<b>Minneapolis/Duluth</b>								
Interstate	128	749,184	7,400	947,200	0	1,696,384		
Private ROW	128	1,274,577	7,400	947,200	1,280,000	3,501,777		
							1,805,393	106.43
<b>Routes Combined</b>								
Interstate	352	2,060,256		2,604,800	0	4,665,056		
Private ROW	352	3,363,328		2,604,800	3,520,000	9,488,128		
							4,823,072	103.39

### **Other Less Restrictive Approaches Are Available to States.**

The exclusive Freeway use provisions of this Agreement are an unlawful barrier to competition that violate Section 253(a) of the Act, which are neither necessary to preserve public safety nor competitively neutral.<sup>1</sup>

The barter reflected in the Agreement is neither fair and reasonable nor competitively neutral because the quantity of free network capacity obtained by the State was directly dependent on granting to one provider a discriminatory advantage of exclusive occupancy.

A State can impose competitively neutral construction standards to assure safety, including reasonable restrictions on construction activity in Freeway ROWs. Such standards have already been adopted by many states, including Minnesota's Guidelines that were approved by the Federal Highway Administration in 1990.<sup>2</sup>

Specific safety standards could include requirements: 1) that no construction occur on the traveled roadway or shoulders of Freeways; 2) that all construction in a given Freeway ROW location occur within a specified period each year; and 3) that multiple conduits or innerducts be installed if needed in congested areas, such as in urban areas with limited Freeway ROW space or in the areas of interchanges, to allow others to install more fiber without more plowing.

If a conduit system is used in some congested areas instead of periodic construction, the conduit system must: 1) be large enough to accommodate all anticipated users; 2) require addition of more conduits if the original capacity is exhausted; 3) provide for later occupants to pay only a reasonable portion of costs<sup>3</sup>; and 4) contain independent control of rates for later users.<sup>4</sup>

The Amendment dated October 19, 1998 fails to meet the requirements of the Act because limiting other service providers to use of the Exclusive Contractor's conduit is unnecessary to meet public safety requirements in rural, uncongested areas. Further, the Amendment: 1) does not require the Exclusive Contractor to install any conduit, much less enough conduit; 2) does not require addition of more conduit if the original conduit capacity is exhausted; 3) does not set standards for occupancy rates to be paid by later service providers; and 4) does not provide for independent oversight of those rates.

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<sup>1</sup> There are many recognized options for use of ROW by States. See, AASHTO Guidance, Exhibit 5 to MTA Opposition, pp 14-15. Minnesota was also aware that a "single partner" option may not be legal under the Act. See Exhibit 5, pp 15-16.

<sup>2</sup> See, Exhibit 7, pp 11-13 to MTA Opposition.

<sup>3</sup> See, pp 13-14 of Exhibit 7.

<sup>4</sup> These factors were known by MnDOT. (See, pp 16-19 of Exhibit 7).